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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

Nos. 41 and 59

THE CHEROKEE, CHOCTAW AND CHICKASAW NATIONS,
Petitioners,

v.

THE STATE OF OKLAHOMA, ET AL.,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE WITH BRIEF ATTACHED

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Comes now the law firm of Wilkinson, Cragun & Barker, of Washington, D.C., and respectfully moves for leave to file the attached brief amicus curiae in the above-entitled case, in support of the Cherokee, Choctaw and Chickasaw Nations of Indians, petitioners.

This law firm has been for many years general counsel to a number of American Indian tribes. The court below, in holding that the petitioners did not own the streambeds within their reservations, has placed a cloud on the tribal title to streambeds in Indian reservations throughout the country, title which in most cases had not been subject to doubt until now. The decision affects the tribes we represent. We have read the briefs of the petitioners and of the United States, amicus curiae, and believe the attached brief will be of additional assistance to the Court.

Respectfully submitted,

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BRIEF OF WILKINSON, CRAGUN & BARKER, AMICUS CURIAE, IN SUPPORT OF THE PETITIONERS

In this brief we maintain that the petitioners should prevail. The *Holt Bank* case relied on by the court below is contrary to the main lines of cases decided by this and other courts, and should be overruled or at least held applicable only to its own precise facts. If this Court should have occasion to discuss *Holt Bank*, we urge it to do so in terms which do not imply that it is good general law.

1. The Decision Below is Contrary to the Spirit of a Long Line of Cases Decided by This Court and Other Courts

The court below did not appear to appreciate the history of the relationship between the United States and its dependent Indian tribes. Its decision is contrary to a long line of cases to the effect that the United States will

exercise the highest good faith with its Indian wards[1] and will not construe treaties to their detriment.[2]

As the court below correctly realized, the case turns on whether Congress, in conveying a vast domain to the Cherokee Nation and the other petitioners, intended to convey the streambeds within that domain. As the court recognized, Congress had power to convey the beds; it was not required to reserve them for some future state. However, the court below, believing that this Court in the *Holt Bank* case[3] set up an extremely strong presumption against any congressional intent to let the Indians have the streambeds within their reservations, held that the evidence did not overcome the presumption, so that the beds passed to the State of Oklahoma when it became a state.

We believe the lower court's decision is erroneous. We believe it is clear that Congress intended to convey the beds to the tribes, not because it said so in so many words, but because the contrary intent is so inconsistent with what the parties did say and do. Certainly Congress had no thought of reserving the streambeds for a future state: that doctrine was not known when the treaties were negotiated;[4] the grant was absolute on its face; and Congress even promised that the reservation would never be included in any future state without tribal consent.

The presumption against a grant of beds of navigable streams seems to be merely an expression of the common

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[1] E.g., *Seminole Nation* v. *United States*, 316 U.S. 286, 297 (1942).

[2] E.g., *Worcester* v. *Georgia*, 31 U.S. 515, 582 (1832); *Puyallup Tribe* v. *Dept. of Game*, 391 U.S. 392, 397-8 (1968); Department of Interior, *Federal Indian Law* 145-7 (1958).

[3] *United States* v. *Holt State Bank*, 270 U.S. 49 (1926).

[4] The doctrine seems to have been laid down in 1845 by *Pollard* v. *Hagan*, 44 U.S. 212.

feeling that certain important water-related properties—streambeds, tidelands, water use rights, water power value rights—should belong to the public, and not handed over to private interests for exploitation. No doubt the intent to convey these properties to private interests would have to be very clearly expressed indeed, as the cases say. However, the courts, including this Court, have time after time recognized that this presumption is not the same when an Indian tribe is involved. Thus Indian tribes have been held to own navigable stream beds,[5] tidelands,[6] water use rights,[7] and water power value rights,[8] when the con-

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[5] *Montana Power Co.* v. *Rochester*, 127 F.2d 189 (9th Cir. 1942) (holding that the bed of a large lake partly within the reservation belonged to the tribe, not the state, the treaty being silent as to ownership of the bed); *Donnelly* v. *United States*, 228 U.S. 243 (1913) (holding that bed of stream in middle of reservation was owned by the Indians and not the state, for criminal jurisdiction purposes); *Moore* v. *United States*, 157 F.2d 760 (9th Cir. 1946), *cert. den.*, 330 U.S. 827 (similar to *Donnelly*); *Fed. Ind. Law* 644.

[6] *United States* v. *Romaine*, 255 Fed. 253 (9th Cir. 1919) (holding that Executive Order impliedly included tidelands within the reservation; presumption that littoral landowners owned only to the high water line, not applicable to Indian tribes); *United States* v. *Stotts*, 49 F.2d 619 (W.D. Wash. 1930) (similar to *Romaine*); *Fed. Ind. Law* 644.

[7] *Alaska Pacific Fisheries Co.* v. *United States*, 248 U.S. 78 (1918) (holding that Congressional grant of islands as a reservation impliedly included surrounding waters as well, so tribe could exclude strangers from fishing there); *Winters* v. *United States*, 207 U.S. 564 (1908) (holding that where tribe ceded aboriginal lands, retaining a reservation, tribe also impliedly reserved right to prevent upstream owners from depleting the stream running through reservation; "equal footing" doctrine held not applicable); *United States* v. *Walker River Irrig. Dist.*, 104 F.2d 334 (9th Cir. 1939) (similar to *Winters*).

At common law the public has a right to hunt and fish on navigable waters within privately owned land, *Swan Island Club* v. *Yarbrough*, 209 F.2d 698 (4th Cir. 1954), but not within an Indian reservation: see *Alaska Pacific* above, *Metlakatla Indians* v. *Egan*, 369 U.S. 45 (1962), cf. *United States* v. *Sturgeon*, 27 Fed. Cas. 1357 (No. 16413) (D.Nev. 1879). See Hobbs, *Indian Hunting & Fishing Rights*, 32 Geo. Wash. L. Rev. 504, notes 27 and 72 (1964).

[8] *Confederated Salish and Kootenai Tribes* v. *United States*, 181 Ct.Cl. 739 (1967); *United States* v. *5677.94 Acres*, 162 F.Supp. 108

trary would have been held with respect to a private citizen. In each of these cases, incidentally, the United States held the lands for the benefit of the tribes; none of the tribes held its land in fee, as do the petitioners.

2. The *Holt Bank* Case is Contrary to the Main Line of Cases in This and Other Courts, and Should Either Be Overruled or Held Applicable Only to Its Own Facts

In the *Holt Bank* case, the Red Lake Chippewas ceded by treaties ending in 1855 all but a section of their aboriginal territory. They held the remaining section as a reservation, but there never was any formal grant of that section to them. In that section was a lake. Minnesota became a state in 1858. In 1889 the Red Lakes ceded their reservation, including the lake, to the United States, which in turn sold the land to homesteaders. The lake was drained around 1912 and the riparian homesteaders assumed that the former bed passed to them under state law. Around 1923 the United States sued for a judgment that it and not the homesteaders owned the former lake bed. This Court held that the homesteaders owned the bed.

The question was what effect the treaties, by which the Red Lakes ceded all but the one remaining tract of land, had on the stream beds in that remaining tract. If the treaties amounted to a pre-1858 confirmation of the Indians' aboriginal ownership of the bed, then Minnesota did not take title to the bed in 1858, and the United States acquired the bed from the Red Lakes in 1889. This Court said (270 U.S. at 58-59):

> "There was nothing in this [the series of treaties ending in 1855] which even approaches a grant of rights in lands underlying navigable waters; nor any-

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(D.Mont. 1958). These cases held that the tribes owned the water power values in the streams running through the reservations. The rule is contra with respect to private citizens. *United States* v. *Twin City Power Co.*, 350 U.S. 222 (1956).

> thing evincing a purpose to depart from the established policy, before stated, of treating such lands as held for the benefit of the future State."

But on the other hand, as this Court recognized in another case, the Red Lake tract "was a reservation within the accepted meaning of the term": [9]

> ". . . in order to create a reservation it is not necessary that there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes. Here the Indian occupation was confined by the treaty to a certain specified tract. That became, in effect, an Indian reservation." [10]

> "If the reservation was free from objection by the Government, it was as effectual as though the particular tract to be used was specifically designated by boundaries in the treaty itself." [11]

We note also this Court's language in the *Winans* case, that a treaty of cession "was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." [12] The Indian "right of occupancy", even when not protected by treaty or statute, has been considered by this Court to be "as sacred as the fee simple of the whites." [13]

So we have this Court saying in one decision *(Hitchcock)* that the Red Lake title is as good as if acquired by treaty, and in another decision *(Holt Bank)* saying the Red Lake title was not good enough to prevent an

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[9] *Minnesota* v. *Hitchcock*, 185 U.S. 373, 389 (1902).

[10] Id. at 390.

[11] Id. at 390, quoting another case with approval.

[12] *United States* v. *Winans*, 198 U.S. 371, 381 (1905).

[13] *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339, 345 (1941).

automatic loss of streambeds when the state was admitted into the Union. The possible implication is that *Holt Bank* applies to *all* reservations, no matter how good the tribe's title is.

Such an implication is irrational, of course, and we have no fears that this Court will wittingly approve any such notion. Such a holding would be contrary to the entire line of cases cited in notes 5 through 8; it would upset lease, boundaries and other rights on many reservations long regarded as settled.

But what we do fear is that this Court, in holding that *Holt Bank* does not apply to the petitioners, who own in fee, might imply that *Holt Bank* is still good law with respect to Indians whose land is, technically speaking, owned by the United States on behalf of the tribes, as is true of the Red Lakes and 90 percent of the other tribes in the country. To thus give *Holt Bank* such undeserved life would be sad news indeed. We urge that *Holt Bank* either be overruled, or held applicable only to its own facts—i.e. to a tribe which never owned a formally established reservation, and which had vacated its habitat at the time the question of bed ownership arose.

CONCLUSION

Wherefore, the judgment of the court below should be reversed, and the beds to the streams involved declared to be in the Indian tribes who are the petitioners.

Respectfully submitted,

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July 28, 1969

Nos. 41 & 59

Memorandum in opposition
to motion of Wilkinson,
Cragun & Barker for leave
to file amicus curiae
brief filed on Aug 5, 1969
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